IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

LRs. of Tikamchand and others
vs.
LRs. of Inder Chandra and others.

S.B.CIVIL SECOND APPEAL NO.205/1980 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 25.9.1980 PASSED BY SHRI B.M. BHOJAK, CIVIL JUDGE, BIKANER IN APPEAL NO.29/1977.

DATE OF JUDGMENT ::: 1.3.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. Sajjan Singh, for the appellants.
Mr. PC Sharma, for the respondents.

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REPORTABLE

BY THE COURT:

Heard learned counsel for the parties.

The appellants are aggrieved against the judgment and decree passed by the appellate court dated 25.9.1980 by which the appellate court.

Brief facts of the case are that the plaintiffs filed a suit for permanent injunction on facts that the suit property is situated in front of the plaintiffs' house measuring 396 square yards and this land is being used only by the family members of the plaintiffs as the land cannot be used for any other purpose. It is alleged that even no door, window, drain etc. of any person is opening over or in this land. The plaintiffs found that the land measuring 45 square yards has been encroached upon by the defendants and they have constructed a wall. The defendants also opened their doors over this land and they have also constructed drains and projections for which they had no right. The plaintiffs, therefore, prayed that the defendants may be evicted from the land measuring 45 square yards and the wall which they raised may also be directed to be removed and the defendants may be restrained from opening any door, window, ventilator and may also be restrained from constructing drain or outlet or projection.

During the pendency of the suit, the plaintiff submitted an application before the Gram Panchayat of the Village for obtaining the patta of the said land in dispute upon which the patta was granted in favour of the plaintiffs on payment of cost for land Rs.1,026/-. The plaintiffs amended the suit and pleaded the facts of purchase of disputed land from the Gram Panchayat.

The defendants submitted written statement with a plea that in fact, they purchased the house from one Dhapu Devi

and while constructing their house, they left some open land also. 45 square yards land for which claim has been set up by the plaintiffs falls within the pattasud land of the defendants and rest of the land is a subject matter of the suit, according to the defendants, is part of a public chowk and it is being used by the residents of the area. The defendants submitted that the plaintiffs did not purchase the land from the Gram Panchayat nor the Panchayat had right to sell the land nor the Collector had right to approve the same. In additional pleas, it is submitted that the Panchayat had no jurisdiction to sell the land in dispute and because of the sale, the plaintiffs have got no right in the land in question. The defendants in additional pleas further pleaded that 45 square yard land, which is in possession of defendants, had boundaries but because of rain, that boundary fell down. Thereafter, Smt. Dhapu after including her some other land towards chowk so as to make it 49 square yards, sold the land to the defendants who constructed wall after leaving 49 square yards of land as open. On this pleas, the defendants contested the suit.

Several issues were framed by the trial court on the basis of the pleas taken by the parties which are not necessary to be incorporated in this judgment looking to the controversy now remained after the decision of two courts below.

In the trial court, the plaintiffs produced as many as five witnesses whereas the defendants examined only defendant no.1 Tikamchand and did not choose to produce any other witness.

The trial court while deciding the issue no.1 held that the suit land was in use of the plaintiffs also but not it was used by them alone. The trial court also held that the sale effected in favour of the plaintiffs by the Gram Panchayat for the land in dispute is illegal as it was effected without following the procedure as required under Rule 266 of the Rules framed under the Rajasthan Panchayat Act. The trial court also rejected the plaintiffs' claim that the land in possession of the defendant measuring 45 square yards vest in the plaintiffs. Ultimately, the trial court dismissed the suit vide judgment and decree dated 22.10.1977.

The plaintiffs being aggrieved by the said judgment and decree preferred first appeal. The first appellate court held that the land in dispute is situated in such a manner that except the plaintiffs and defendants, no one else can use the land and, therefore, the land in question is not a land of public chowk or land left for public utility. The first appellate court held that if there was some non-observation of the procedure under Rule 266, then that cannot make the sale of land in favour of the plaintiffs as illegal. The first appellate court partly allowed the suit of the plaintiffs and held that the land which is in possession of the defendants, the defendants can keep the possession and also they will have their right of way from the door “X” and the defendants need not to remove this wall but so far as rest of the land is concerned, the injunction was granted against the defendants. The first appellate court also ordered that the defendants shall not

open any door, window or aperture nor shall raise any drain towards the land which was purchased by the plaintiffs. Aggrieved against the judgment and decree of the first appellate court dated 25.9.1980, this appeal has been preferred by the defendants.

Following substantial questions of law were framed by this Court after hearing both the parties :-

> "(i) Whether in the facts and circumstances of the case, the land in question is a public land, and the Gram Panchayat, Napasar had no authority to sell the same ?
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> (ii) Whether non-compliance of the provisions of Rule 266 of the Rajasthan Panchayat and Nyaya Panchayat (General) Rules makes the sale void and not irregular, and further the civil court will have a jurisdiction to declare such a sale illegal and void ?"

According to learned counsel for the defendants-appellants, the plaintiffs-respondents came with a case that the land in dispute including the land in possession of the defendants is the land of public chowk and is being used for way, therefore, the Panchayat could not have granted the patta for the said land to the plaintiffs. It is also submitted that it was the duty of the plaintiffs to prove that the sale of the property in favour of the plaintiffs is a valid sale. In this case, the trial court

found that the sale is invalid as the Gram Panchayat effected the sale without following the procedure prescribed by Rule 266 for disposal of the land. The plaintiffs did not produce all the relevant record to prove that the sale is valid. The defendants when challenged the sale as defendants in the suit filed by the plaintiffs, then they could have done so even without filing separate suit for cancellation of the said sale/patta. Learned counsel for the appellants relied upon the judgment of the Hon'ble Supreme Court given in the case of Bajranglal Shivchandrai Ruia vs. Shashikant N. Ruia and others reported in 2004 AIR SCW 2605 wherein the Hon'ble Apex Court held that in a suit for possession and declaration of title, the defendants can set up nullity of title as defence even though the suit for that purpose has not been filed nor it is necessary that the defendants should challenge the title of the plaintiff by way of substantive suit. According to learned counsel for the appellants, in view of the above decision, the Hon'ble Supreme Court held that in case it is found that the sale effected by the Municipal Board is against the Rules, then the Court can certainly dismiss the suit of the plaintiffs.

Learned counsel for the appellants-defendants vehemently submitted that the trial court gave cogent reasons for dismissing the suit of the plaintiffs whereas the appellate court drew inference only on the basis of assumptions rather than legal evidence. It is submitted that the plaintiffs and their witnesses themselves admitted that the land in question was used by the public and in

view of their admissions only, it is fully proved that the land in question was not available for sale with the Gram Panchayat.

Learned counsel for the appellants vehemently submitted that it will result into great hardship in case, the judgment of the first appellate court will remain as it is. According to learned counsel for the appellants, the appellants are in possession of 45 square yards of land for which the plaintiffs sought relief. Beyond that, the defendants-appellants' more land measuring 4 square yards is there on which there exists drain and other apertures. By the impugned decree, the defendants have been restrained from opening doors, windows and other apertures. It is also submitted that the plaintiffs miserably failed to prove their case and, therefore, even if the defendants have not proved their title or right over the entire land, then also, the plaintiffs cannot succeed on this ground alone that the defendants have not proved the facts which they alleged about their property.

Learned counsel for the respondents/plaintiffs submitted that the sale deed was executed by the Gram Panchayat in favour of the plaintiffs and, therefore, the plaintiffs are owners of the property. The plaintiffs' sale deed was never challenged by the defendants despite having knowledge. The defendants in the suit of the plaintiffs if could have challenged the sale of land by Gram Panchayat in favour of plaintiff than firstly there is no evidence in support of said challenge. It is also submitted that the

trial court committed serious error of fact as well as law in dismissing the suit of the plaintiffs. It is also submitted that the trial court exceeded its jurisdiction in entering into the factual aspect whether Rule 266 was followed or not by the Gram Panchayat before selling the land in dispute to the plaintiffs.

According to learned counsel for the plaintiffs-respondents, the appellants never raised any objection about non-observance of the Panchayat Rules by the Gram Panchayat before the sale of land in favour of the plaintiffs. The only objection raised by the defendants in their written statement was that the Gram Panchayat had no jurisdiction to sell the land in dispute and the Collector has no right to approve the sale deed. Said pleas were taken without laying down any factual foundation for challenge. Assuming for the sake of arguments that the sale deed executed in favour of the plaintiffs could have been challenged by the defendants in this very suit of the plaintiffs and the Court could have looked into the entire sale transaction to find out whether the sale deed was executed by the Gram Panchayat in accordance with the Rules or not, then the defendants failed to place on record any material by which it can be gathered that the Rules were not followed. There is a presumption in favour of due observance of the procedure by the public authorities. The patta was issued in favour of the plaintiffs and it was the plea of the defendants that the patta is invalid, then the defendants could have submitted so with specific allegations. In the entire written statement, there is no

allegation that the procedure was not followed, therefore, not only this but there is no evidence on record from the side of the defendants that before grant of patta in favour of the plaintiffs, Rules were not followed, Neither oral nor documentary evidence. According to learned counsel for the respondents, rather there is an evidence that even the notices were issued by the Gram Panchayat before issuing patta in favour of the plaintiffs and this fact has been admitted by the defendant himself in his statement before the trial court and it is not the case of the defendants that they raised any objection to it.

Apart from above, according to learned counsel for the respondents, the first appellate court has only decreed the suit of the plaintiffs restraining the defendants from interfering in rest of the land for which the defendants cannot have any claim. The defendants failed to prove that Dhapu sold the land to the defendants measuring 45 square yards or 49 square yards as claimed by the appellants during the course of arguments. Neither the defendants produce any evidence about exact location of their purchased property nor they produced any other witness to prove that the land was in occupation of the defendants since long.

I have considered the submissions of learned counsel for the parties and perused the entire record.

In brief, the facts may be recapitulated here again. The plaintiffs claim that a big piece of land was lying

open in front of their house which was in use by the plaintiffs alone as the land in question is situated in front of their house. There was no door or window or any aperture of any other person. The plaintiffs produced witnesses in support of their claim by which it is fully proved that it was only an open piece of land and because of its location, it could not have been used by the public at large. The plaintiffs applied for grant of patta for the land in dispute obviously on the basis of their claim as the land is situated in front of their houses. The patta was granted by the Gram Panchayat and before that, the notices were issued by the Gram Panchayat as admitted by the defendant in his statement. The defendants never applied for the land in question to be allotted to them. No person raised any grievance against the grant of patta in favour of plaintiffs. The defendants failed to produce any witness from the entire nearby area to prove that the land in question is a public chowk or has been dedicated for public purpose or is being used by the public. The location of the land also suggests that it could have been used only by the plaintiffs and his family members as their houses are situated adjacent to the land in dispute. Therefore, so far as the authority of the Gram Panchayat to sell the land in question is concerned, that was there. Every Government land or every open piece of land situated near the houses is not necessarily a public chowk or a land dedicated for public use. It depends upon the facts of each case. In this case, from the evidence of the plaintiffs, it is proved that the land was not earmarked, reserved or dedicated for

public use. In view of the above, the substantial question no.1 is decided against the appellants.

Though substantial question of law has been framed that whether non-compliance of the provisions of Rule 266 of the Rajasthan Panchayat and Nyay Panchayat (General) Rules makes the sale void and not irregular but it appears from the pleadings that that was not the case set up by the defendants in their written statement. Assuming for the sake of arguments that in additional pleas in written statement, the broad pleas were taken and there pleas may cover the plea of not following Rule 266 of the Rajasthan Panchayat Act, then it was the duty of the defendants to prove the fact that Rule 266 was not followed by the Gram Panchayat before granting patta in favour of the plaintiffs. The defendants neither produced nor summoned the record of the Gram Panchayat. There is presumption in favour of due observance of the procedure by the administrative authorities and when the plaintiff produced the deed conveying the title of the property by Gram Panchayat to the plaintiffs, then it was the duty of the defendants to plead specific facts on the basis of which they want to challenge the alienation and thereafter, they should have produced the evidence in support of their pleas.

In view of the above, the judgment relied upon by the learned counsel for the appellants in the case of Bajranglal (supra) is not applicable. The defendants could have challenged the title of the plaintiffs for the land in

dispute but they failed to challenge in proper manner and further they failed to prove the fact that Rules were not followed.

It is true that the first appellate court observed that the provisions of Rule 266 were not followed and that is irregularity only and not illegality. At this stage, it may be observed that not following the complete procedure by the authority cannot make the decision invalid. It depends upon the nature of rule which was not followed before taking decision. Procedure may have mandatory requirements and some requirements may be mere procedural not affecting the decision due to non-observance of those procedural rules. In the present case, patta proceedings were taken by the Gram Panchayat and before sale of land, notices were issued. Nobody, even the defendants, did not raise any objection before the Gram Panchayat, but this Court is of the view that the sale deed on this count cannot be said to be void. It is clear from the facts pleaded and proved and the finding recorded by the two courts below that the land was in use of the plaintiffs also, therefore, they had some claim over the land and there was no other claimants for the land, therefore, the Panchayat has not committed any illegality in granting the deed in favour of the plaintiffs conveying the title of the property.

Learned counsel for the appellants also tried to submit that to challenge the patta issued by the Gram Panchayat, an appeal has been preferred and which according to his

information, is pending. Learned counsel for the appellants failed to point out any material from the record by which it can be gathered that the patta issued in favour of the plaintiffs was ever challenged by the defendants and if challenged, then that appeal is still pending. Even if any appeal is pending (for 35 years), then that is of no consequence after decision of civil court in this suit.

In view of the above, the substantial question no.2 is also decided against the appellants.

In view of the above, I do not find any merit in the appeal, therefore, this appeal deserves to be dismissed, hence, dismissed.

(PRAKASH TATIA), J.

S.Phophaliya